UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOHN P. SARGENT, SR.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 00-171-P-C***
	)	
KENNETH S. APFEL, Commissioner	***)***	
of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

The plaintiff in this Social Security Disability ("SSD") appeal raises numerous issues: whether the administrative law judge (i) failed to develop the record adequately; (ii) improperly discounted the report of a treating physician; (iii) erred in finding the plaintiff's hearing loss and depression not to be severe; (iv) improperly assessed the plaintiff's credibility and reports of pain; (v) improperly proceeded without a medical advisor at the hearing on the plaintiff's claim; (vi) impermissibly evaluated raw medical evidence; (vii) improperly found that the plaintiff was able to return to his past work; and (viii) issued a decision that was not supported by substantial evidence. I recommend that the court remand the case for further proceedings.

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 1, 2000 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations and case authority and page references to the administrative record.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity since September 1, 1996, Finding 2, Record p. 17; that the medical evidence established that he had mild arthritis in his knees and left ankle, impairments that were severe but did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 ("the Listings"), Finding 3, *id*.; that his statements concerning his impairments and their impact on his ability to work were not entirely credible, Finding 4, *id.*; that he lacked the residual functional capacity to lift and carry more than 50 pounds or more than 25 pounds on a regular basis, or to stand or walk for more than four hours in an eight-hour work day, Finding 5, *id*.; that his past relevant work as a telephone communication technician did not require the performance of work functions precluded by his medically determinable impairments, Findings 6-7, *id*. at 17-18; that his impairments did not prevent him from performing his past relevant work, Finding 8, *id*. at 18; and that he had not been under a disability as defined in the Social Security Act at any time through the date of the decision, Finding 9, *id*. The plaintiff apparently submitted additional medical and other records to the Appeals Council after the administrative law judge issued his decision. *Id*. at 270-81. The Appeals Council, noting that it had considered the additional evidence, declined to review the decision, *id*. at 6-7, making it the final decision of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion

drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Discussion

The administrative law judge's conclusion that the plaintiff could return to his past relevant work as a telephone communication technician occurred at Step 4 of the sequential evaluation process, where the burden of proof is on the claimant. 20 C.F.R. § 404.1520(e); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987).

The plaintiff contends that the administrative law judge failed to comply with an unspecified regulation, apparently 20 C.F.R. § 404.1527(d), when he relied on the opinion of an unidentified non-examining consultant physician that conflicted with that of a treating physician, without obtaining a further consultative examination. Plaintiff's Itemized Statement of Specific Errors ("Statement") (Docket No. 5) at 3-4. That regulation provides, in relevant part, that the commissioner will generally give more weight to the opinion of a health care provider who has examined the claimant than to that of a source who has not examined the claimant and that when the commissioner decides not to give more weight to the opinion of a treating provider than to that of another provider, he will state in his decision the reasons for the weight given to the opinion of the treating source. 20 C.F.R. § 404.1527(d)(1) & (2). The plaintiff refers to pages 242-45 of the administrative record as the source of the "restrictions" imposed by his treating physician which he contends the administrative law judge wrongly rejected. Statement at 3. The physical restrictions included in the "Arthritis Residual Functional Capacity Questionnaire" found at pages 243-47 of the record, a document signed by Patrick J. Connolly, M.D., and dated December 2, 1998, are the following: (i) the plaintiff can walk 3-4 city blocks without rest; (ii) the plaintiff can sit continuously for 30 minutes and stand continuously for 45 minutes; (iii) the plaintiff can stand or walk for a total of less than two hours in an eight-hour work

day; (iv) the plaintiff can sit for a total of about two hours in an eight-hour work day; (v) the plaintiff needs to walk for five minutes every 30 minutes in an eight-hour work day; (vi) the plaintiff needs to be able to shift positions at will; (vii) the plaintiff will need to take three unscheduled breaks of five to ten minutes each during an eight-hour work day; (viii) the plaintiff can carry fifty pounds occasionally; (ix) the plaintiff can perform repetitive reaching, handling or fingering with either hand only 30% of the time during an eight-hour work day; and (x) the plaintiff can bend and twist at the waist 30% of the time during an eight-hour work day. Record at 245-46. Dr. Connolly also stated that the plaintiff's symptoms would seldom interfere with attention and concentration and would impose only a slight limitation on his ability to deal with work stress. *Id*. at 244.

The administrative law judge found that the plaintiff could lift and carry fifty pounds, and twenty-five pounds on a regular basis, and stand or walk for up to four hours in an eight-hour work day. *Id*. at 17. He did not specifically address the other limitations presented by Dr. Connolly but stated that he did "not accept the more restrictive residual functional capacity suggested by Dr. Connolly because it is not consistent with the overall medical evidence." *Id*. at 16. He noted that Dr. Connolly filled out the questionnaire after stating, over a year earlier, that it was unlikely that the plaintiff could continue to work as a sea urchin diver because his joint pain was exacerbated by heavy lifting and working in cold, damp environments, *id*., that the "extremely limited work capacity" described in the questionnaire was "not supported by any new objective findings," *id*. at 16-17, and that the new work limitations were "apparently based on the claimant's subjective complaints," *id*. at 17. The administrative law judge also noted that radiological studies and lab tests had not shown the presence of any significant pathology, *id*. at 16, and relied on the report of Paul Stucki, M.D., a consulting physician who examined the plaintiff on May 29, 1997, *id*. at 16 & 226-31. Dr. Stucki's

report noted that x-rays were not available to him and does not discuss physical limitations beyond reporting the plaintiff's own estimates of his physical limitations.[2] *Id*. at 230.

The plaintiff argues that the reports of James J. Hall, M.D., a consultant who did not examine him, "discussed a more restricted R[esidual] F[unctional] C[apacity]" and agreed with Dr. Connolly's conclusions. Statement at 4. In fact, Dr. Hall did assign "a new, more restrictive RFC" after viewing an x-ray of the plaintiff's left ankle, which showed mild degenerative changes, although he noted that x-rays of the plaintiff's knees were normal. Record at 240. Dr. Hall's "new" RFC, dated January 11, 1999, *id*. at 239, differs from the "old" RFCs assigned by two other non-examining consultants in this respect only in that he has checked the box under the heading "Stand and/or walk" to indicate a finding that the plaintiff could stand or walk for "at least 2 hours in an 8-hour work day," *id*. at 233, while one of the two physicians who prepared the earlier evaluations checked the box for "about 6 hours in an 8-hour work day," *id*. at 189 (report of Lawrence P. Johnson, M.D., dated October 10, 1997). The other earlier report is identical to Dr. Hall's report on this point. *Id*. at 181. Dr. Hall checked "no" in response to the question "[A]re there treating/examining source conclusions about the claimant's limitations or restrictions which are significantly different from your findings?" *Id*. at 238. This check mark cannot bear the weight that the plaintiff seeks to impose on it. The question could as easily refer to the report of Dr. Stucki as to

[2] Contrary to the plaintiff's suggestion, Statement at 4, the lack of an evaluation of his residual functional capacity in Dr. Stucki's report does not mean that the administrative law judge was required to seek another consultative examination. The regulation to which the plaintiff meant to refer, 20 C.F.R. § 404.1519n(c)(6), specifically states that the absence of a statement about what the claimant can still do in a work setting despite his impairments "will not make the report incomplete." The authority cited by the plaintiff, *Hawkins v. Chater*, 113 F.3d 1162, 1167 (10th Cir. 1997), makes clear that a consultative examination is required only if the claimant has provided evidence to suggest a reasonable possibility that a severe impairment exists and only if such an examination is necessary or helpful to resolve the issue of impairment. Since the plaintiff takes the position that Dr. Connolly's opinion binds the commissioner in this case, it is difficult to see how an additional examination would be necessary.

the questionnaire filled out by Dr. Connolly, particularly given the fact that several of Dr. Hall's responses concerning physical restrictions were significantly different from the limitations imposed by Dr. Connolly in his response to the questionnaire.

Because the administrative law judge in this case rejected most of Dr. Connolly's limitations based on an asserted lack of objective findings, *id.* at 16-17, the appropriate question here is whether there is medical evidence in the form of test results and medical findings that support Dr. Connolly's opinion. 20 C.F.R. § 404.1527(d)(2)(ii) & (3). There is medical evidence to support limitations due to mild degenerative changes in the left ankle, Record at 253, and an opinion of Dr. Connolly's physician's assistant, unsupported by testing, provides some support for limitations due to knee pain, *id*. at 251. While it is difficult to tie this limited evidence to the limitations imposed by Dr. Connolly, when considered along with the post-hearing report[3] of Dr. Graf, *id*. at 256-57, the administrative law judge's dismissal of Dr. Connolly's limitations does not seem to find substantial evidentiary support in the administrative record. Remand for further consideration of the plaintiff's residual functional capacity appears to be in order.

In the event that the court adopts my recommendation on this point, some analysis of the plaintiff's remaining arguments would be of benefit to the commissioner. The plaintiff's claim that the administrative law judge failed to develop the record sufficiently, Statement at 5, is seriously undermined by the fact that he was represented by counsel at the hearing. *See Heggarty v. Sullivan*, 947 F.2d 990, 997 (1st Cir. 1991). If there was a "gap" in the evidence, counsel for the claimant has

[3] The First Circuit has recently recognized the split of authority among circuit courts that have addressed the question whether a reviewing court may consider evidence submitted after the administrative law judge has issued a decision when the Appeals Council has accepted and considered that evidence but declined to review the decision. *Ward v. Commissioner of Social Sec.*, 211 F.3d 652, 657 n.2 (1st Cir. 2000). The majority of circuits that have ruled on the question hold that the court should consider the additional evidence. *E.g., Perez v. Chater*, 77 F.3d 41, 45 (2d Cir. 1996); *O'Dell v. Shalala*, 44 F.3d 855, 859 (10th Cir. 1994); *Riley v. Shalala*, 18 F.3d 619, 622 (8th Cir. 1994); *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993); *Wilkins v. Secretary, Dep't of Health & Human Servs.*, 953 F.2d 93, 96 (4th Cir. 1991). I continue to find the majority view persuasive.

some obligation to point it out.[4] In any event, the plaintiff does not point to any such gap that required further inquiry by the administrative law judge.

The plaintiff also claims as reversible error the failure of the administrative law judge to consult a medical advisor at the hearing. Statement at 11. Use of a medical advisor is a matter left to the commissioner's discretion; "nothing in the [Social Security] Act or regulations requires it." *Rodriguez Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 5 (1st Cir. 1987); *accord, Siedlecki v. Apfel*, 46 F.Supp.2d 729, 732 (N.D. Ohio 1999).

The plaintiff complains that the administrative law judge "failed to evaluate the evidence regarding depression or hearing loss anywhere in his decision." Statement at 3. In fact, the administrative law judge did evaluate the evidence concerning depression and hearing loss, Record at 14-15. It is the burden of the claimant at Step 4 to show the "practical consequences" of her claimed impairments on the requirements of his former work. *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 6 (1st Cir. 1991). Here, the plaintiff made no showing of the effect, if any, of his claimed hearing loss and depression on his ability to perform his work as a telephone communications technician. Dr. Connolly, the treating physician who prescribed Prozac at the plaintiff's request for treatment of depression shortly before the hearing, Record at 242, although the plaintiff had not begun taking it by the time of the hearing, *id.* at 31, imposed no psychological limitations on the plaintiff as a result, *id*. at 247. Nor did he respond affirmatively to an invitation on

[4] At oral argument, counsel for the plaintiff asserted that the Supreme Court's decision in *Sims v. Apfel*, 120 S.Ct. 2080 (2000), supports his contention that the administrative law judge's responsibility to develop the record is the same whether or not the claimant is represented by counsel at the hearing. I have read *Sims* carefully and find no support for this argument in that opinion.

the questionnaire on which the plaintiff relies to list any limitation due to difficulty in hearing. *Id*. At Step 4, the administrative law judge did not err in his treatment of these two claimed impairments.

The plaintiff next argues that the administrative law judge improperly discounted his allegations of pain, contending that the administrative law judge "failed to make any serious attempt to" evaluate the plaintiff's testimony on this point. Statement at 6. In fact, the administrative law judge discusses the plaintiff's testimony concerning his pain at some length in his opinion. Record at 14-17. The First Circuit established guidelines for evaluation of a Social Security claimant's subjective allegations of pain in *Avery v. Secretary of Health & Human Servs*., 797 F.2d 19 (1st Cir. 1986). "[A]s a primary requirement, there must be a clinically determinable medical impairment that can reasonably be expected to produce the pain alleged." *Id*. at 21. After that determination is made, certain factors must be addressed. *Id*. at 29 (appendix). These factors are set forth in the administrative law judge's opinion. Record at 15. The plaintiff contends that the administrative law judge "simply refuse[d] to believe" his "uncontradicted" testimony concerning pain. Statement at 7. To the contrary, the opinion lists several reasons why the administrative law judge found that testimony "not entirely credible," Record at 17, including "[l]engthy gaps in the treatment history; the absence of evidence that potent pain relievers were requested by Mr. Sargent, or deemed medically appropriate by treating sources; and the claimant's repeated denials of ongoing joint pain after the alleged onset date," followed by accurate citations to the medical records, *id*. at 15-16.[5] I note that the "new" consultative report of Dr. Hall, on which the plaintiff relies for a different purpose, states that "most of [the plaintiff's] pain complaints are out of proportion to the findings." *Id*. at 237. While the

[5] The plaintiff cites Social Security Ruling 88-13 as authority for his position. Statement at 8. That ruling was superceded by Social Security Ruling 95-5p, which provides, in relevant part: "[I]n all cases in which pain or other symptoms are alleged, the determination or decision rationale must contain a thorough discussion and analysis of the objective medical and other evidence, including the individual's complaints of pain or other symptoms and the adjudicator's personal observations. The rationale must include a resolution of any inconsistencies in the evidence as a whole and set forth a logical explanation of the individual's ability to work." Social Security (*continued on next page*)

opinion unfortunately does not mention the plaintiff's activities of daily living, which is one of the *Avery* criteria, there is evidence in the administrative record that suggests a level of activity that is inconsistent with the degree of pain alleged by the plaintiff. Record at 172-73. On balance, the opinion provides a sufficient statement of the reasons why the plaintiff's testimony concerning pain was not fully credited.[6] *See DaRosa v. Secretary of Health & Human Servs*., 803 F.2d 24, 26 (1st Cir. 1986). Nor was the administrative law judge improperly interpreting raw medical data, as alleged by the plaintiff, Statement at 12, in order to reach this conclusion.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Ruling 95-5p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (2000 Supplement), at 105.

[6] The plaintiff also argues that "the failure to make any inquiry, by either consultative examination or any other means, into the possibility of a mental impairment if [the administrative law judge] concluded that the testimony reflected pain disproportionate to the objective physical evidence in a case such as this where there is express evidence of depression" is a "glaring omission, in and of itself requiring reversal." Statement at 9 n.2. He cites the following language in the appendix to the *Avery* decision in support of this argument: "When medical findings do not substantiate any physical impairment capable of producing the alleged pain (and a favorable determination cannot be made on the basis of the total record), the possibility of a mental impairment as the basis for the pain should be investigated." 797 F.2d at 27. Here, there is no evidence in any of the medical records that the plaintiff's depression would cause him to perceive pain that is not reasonably tied to any physical condition; indeed, a separate category of mental impairment, somatoform disorders, addresses that pathology. *Compare* 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.04 (affective disorders) *with* § 12.07 (somatoform disorders). There is no suggestion in the medical records that the plaintiff suffers from any such mental impairment. To impose on the commissioner the requirement that he seek a psychological consultation or otherwise seek further information from a claimant represented by counsel under the circumstances present here would result in the expansion of many, even perhaps a majority of, administrative law judge hearings and applications for benefits in general, without a discernable concomitant benefit.

Date this 4th day of December, 2000.

David M. Cohen
United States Magistrate Judge

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